

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA
PRADESH

Criminal Revision Case No.979 of 2018

Between:

Sanneerappa

Petitioner

VERSUS

The State of A.P.,
rep., by its Public Prosecutor,
High Court compound, Hyderabad & others.

.. Respondents

Date of Judgment Pronounced: **05.07.2018**

SUBMITTED FOR APPROVAL:

HON'BLE SRI JUSTICE P. KESHAVA RAO

1. Whether Reporters of Local newspapers may be allowed to see the Judgments?
2. Whether the copies of judgment may be marked to Law Reports/Journals?
3. Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment?

JUSTICE P. KESHAVA RAO

*** HON'BLE SRI JUSTICE P. KESHA VA RAO**
+ CRIMINAL REVISION CASE No.979 OF 2018

% Dated 05-07-2018

Sanneerappa

Petitioner

VERSUS

\$ The State of A.P.,
rep., by its Public Prosecutor,
High Court compound, Hyderabad & others.

Respondents

! Counsel for Petitioner : Sri M. Chalapati Rao.

^Counsel for the respondent : Public Prosecutor
Counsel for respondent Nos.2&3: Sri N. Ranga Reddy

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? Cases referred

1. 2014 (1) ALT (Crl.) 252 (SC)
2. AIR 2015 SC 418
3. 2016 (3) ALD 572

HON'BLE SRI JUSTICE P. KESHA RAO**CRIMINAL REVISION CASE No.979 of 2018****ORDER:**

Heard the learned counsel for the petitioner as well as respondent Nos.2 and 3.

The present revision case is filed questioning the orders passed in Crl.R.P.No.28 of 2015 dated 18.01.2018 on the file of the Court of learned II Additional District and Sessions Judge, Hindupur, Anantapur District, reversing the orders passed in M.C.No.8 of 2012 dated 16.04.2015 on the file of the learned Judicial Magistrate of First Class, Madakasira, Anantapur District.

The facts in brief are that respondent Nos.2 and 3 filed M.C.No.8 of 2012 claiming a sum of Rs.3,000/- each per month against the petitioner. It is their case that respondent No.2 is the legally wedded wife of the petitioner having solemnized the marriage on 12.04.1996 at the house of Begadar Venkataramanappa according to the Hindu rites and customs. At the time of marriage, the 2nd respondent's father presented gold ring of two grams, some silk sarees, gold ear studs to the 2nd respondent and also to the petitioner and spent huge amount for performing the marriage. After marriage, the 2nd respondent joined the petitioner and led a happy marital life for about ten years. Out of wedlock, they were blessed with respondent No.3. After giving birth to respondent No.3, the petitioner addicted to vices including

adulterous life and neglected them. The petitioner used to quarrel with the 2nd respondent and harassed her mentally and physically demanding additional dowry. In spite of panchayats convened, there was no change in the behaviour of the petitioner. The petitioner even beat the 2nd respondent when she questioned about his illegal acts. She also stated that the petitioner is working in a factory in Bangalore and also doing business apart from his profession and is capable of maintaining them.

The petitioner filed counter denying the petition averments and contended *inter alia* that there is no relationship of wife and husband between him and the 2nd respondent. Therefore, the question of the 3rd respondent born to them may not arise. The 2nd respondent is a cousin sister to him. She has to explain as to who is Begadar Venkataramanappa. In fact, the photographs and identity cards are created and manipulated documents. The 2nd respondent is neither the resident of Hottebata nor S.S. Gundlu and she is absolutely no way concerned with him. On the other hand, he specifically stated that he married one Nagamani 18 years ago and she is his legally wedded wife. Out of wedlock, they were blessed with two children and they were studying 9th and 3rd class respectively. In fact, the 2nd respondent filed the maintenance case only to defame him in the society and to extract money. He also stated that neither he is the husband nor having any physical contact with her.

During the course of trial, the 2nd respondent examined PWs.1 to 3, including herself, and marked Exs.P1 to P3 on her behalf. The petitioner examined himself as RW.1 and marked Exs.R1 to R5 on his behalf.

After hearing, the learned Magistrate dismissed the maintenance case by orders dated 16.04.2015. Aggrieved by the said orders, respondent Nos.2 and 3 filed Crl.R.P.No.28 of 2015 on the file of the learned II Additional District and Sessions Judge, Hindupur. The learned Sessions Judge, after hearing both the parties, allowed the revision petition with costs and set aside the orders passed in M.C.No.8 of 2012 by orders dated 18.01.2018. Aggrieved by the said orders, the present revision case is filed.

Learned counsel appearing for the petitioner contended that the order of the learned Sessions Judge, Hindupur, is incorrect, contrary to the evidence on record and well settled principles of law in appreciating the evidence and is perverse one. The learned Sessions Judge miserably failed to appreciate that the 2nd respondent was not ready to undergo the DNA test to find out the paternity of the 3rd respondent and therefore an adverse inference should have been drawn against her that they are not the wife and biological son of the petitioner. In fact, it is the case of the petitioner that he has been residing at S.S. Gundlu Village, Gudibanda Mandal and never stayed at Bangalore at the address shown in the cause title of the maintenance case at any time. The learned

counsel also emphasized on the aspect that the learned Sessions Judge miserably failed to appreciate that the 2nd and 3rd respondents are not the wife and biological son of the petitioner on the ground that if the 3rd respondent is aged about 16 years on the date of filing of M.C.No.8 of 2012 dated 07.08.2012, when the marriage, according to the 2nd respondent, took place on 12.04.1996, but the 2nd respondent stated in her evidence that the 3rd respondent was born to her after two years of her marriage. Therefore, there is no time gap between the marriage and the birth of the 3rd respondent. The learned Sessions Judge also failed to consider the evidence adduced on behalf of the petitioner that he married Nagamani about 20 years back, which was admitted by PW.3 in the cross-examination and he begot two daughters, namely, Bharathi and Ammajakka, who were studying tenth and fourth class respectively. Even though the 2nd respondent stated that her marriage was performed at Hottebetta, which is neither the village of her father nor that of the petitioner, she failed to examine either her father or any of her close relatives or Begadar Venkataramanappa in whose house the said marriage was performed or any elders before whom the panchayat was held to solve the marital dispute between them. The learned Sessions Judge also failed to appreciate that the 2nd respondent did not prove the crucial aspect that she led happy marital life with the petitioner for ten years and was driven out of the matrimonial house one

year before filing of the maintenance case and that the petitioner demanded additional dowry subjecting her to mental and physical cruelty. Though the evidence of PWs.1 to 3 is inconsistent with the case set up by the 2nd respondent that she is the legally wedded wife of the petitioner, the learned Sessions Judge ought not to have reversed the well considered orders passed by the learned Magistrate. The learned Sessions Judge proceeding on the basis that there is a long and continued cohabitation between the petitioner and the 2nd respondent, is without any basis and contrary to the case set up by the 2nd respondent herself. Learned counsel also emphasized that Exs.P1 to P3, which are a photo without negative and Xerox copies of the voters list ought not to have been relied upon since they are inadmissible in evidence. In order to substantiate his contentions, he relied on **Nandlal Wasudeo Badwaik vs. Late Nandlal Badwaik and another**¹, **Dipanwita Roy vs. Ronobroto Roy**² and **Govindula Sathaiah vs. Govindula Manjula**³.

Per contra, the learned counsel appearing for respondent Nos.2 and 3 submitted that the 2nd respondent is the legally wedded wife of the petitioner and out of wedlock, they were blessed with the 3rd respondent. Though the petitioner has taken a plea that he married Nagamani about 20 years back, he failed to prove that she is his wife. The

¹ 2014 (1) ALT (Crl.) 252 (SC)

² AIR 2015 SC 418

³ 2016 (3) ALD 572

petitioner has not examined anybody from the village to prove the factum of marriage with Nagamani. EXs.P2 and P3, which are the Xerox copies of the voters list, evidence that the petitioner is the husband of the 2nd respondent. Ex.P1, photograph, also establishes that the petitioner and the 2nd respondent are the husband and wife. He also submitted that since the proceedings under Section 125 Cr.P.C. are summary in nature, only *prima facie* case has to be made out for the purpose of claiming maintenance and since Exs.P1 to P3 establish the same, there is no illegality or irregularity in the orders passed by the learned Sessions Judge. He also submitted that except the evidence of the petitioner in the form of RW.1, there is no other evidence available on record to support his contention that he has no relationship with respondent Nos.2 and 3. He also submitted that the presumption of lawful marriage has to be drawn when the petitioner and the 2nd respondent lived together for about more than 10 years. Therefore, he sought dismissal of the revision case.

Having heard both the counsel and from a perusal of the material on record, it is revealed that respondent Nos.2 and 3 filed M.C.No.8 of 2012 claiming a sum of Rs.3,000/- each per month towards maintenance against the petitioner. It is the specific case of the 2nd respondent that her marriage with the petitioner was performed on 12.04.1996 and out of wedlock, they were blessed with the 3rd respondent. However,

after the 3rd respondent was born, the petitioner was addicted to vices and he necked out her from the matrimonial house demanding additional dowry and etc. On the other hand, it is the specific case of the petitioner that the 2nd respondent is not his wife and he has no physical contact with her. Therefore, the 3rd respondent is not his son. In fact, he was married 20 years back with one Nagamani and they are blessed with two daughters, namely, Bharati and Ammajakka. The 2nd respondent filed maintenance case only for the purpose of defaming him in the society and in the process to extract money from him. Though the petitioner has taken steps to undergo DNA test to show the paternity of the 3rd respondent, the 2nd respondent categorically stated in the counter that she is not interested to undergo DNA test. Basing on the same, the point that arises for consideration is:

Whether the 2nd respondent is the legally wedded wife of the petitioner and if so, whether the 3rd respondent is born to them?

In order to prove that the 2nd respondent is the legally wedded wife of the petitioner and the 3rd respondent is entitled for maintenance, PWs.1 to 3 are examined. The 2nd respondent examined herself as PW.1. In her examination she has narrated the facts as stated in the maintenance case. In the cross-examination, it has been elicited that Begadar Venkataramanappa in whose house the marriage was performed is not their relative and he is also not a purohit.

The said Venkataramanappa belongs to Kamsali caste and he is not her caste person. She has not filed any wedding card as no wedding cards were printed for their marriage. It is also elicited that the said Venkataramanappa and her father are alive. However, the 2nd respondent for the reasons best known to her has not examined any one of them apart from even examining any close relative or the family friend, who attended the said marriage. To prove her marriage, she marked Exs.P1 to P3. Ex.P1 is the photograph without negative and Exs.P2 and P3 are the Xerox copies of the voters list. A photograph without a negative cannot be considered as a proof to prove that it establishes the marriage of the 2nd respondent and the petitioner. As far as the Xerox copies of the voters list are concerned, they are inadmissible in evidence apart from the aspect that in the cross-examination of PW.1 i.e., the 2nd respondent, it is brought on record that in their village in Kapu caste some other people are also there with similar names. So in the light of the above, it cannot be said that even if Exs.P2 and P3 can be looked into for the purpose of proving the *prima facie* relationship between the petitioner and the 2nd respondent, since the same is nullified by virtue of the cross-examination of PW.1. Further, when the petitioner has categorically denied that the 2nd respondent is his wife and the 3rd respondent is his biological son, they ought to have taken steps to prove that the petitioner is the husband and father of respondent Nos.2 and 3 respectively by

way of filing an appropriate application to undergo the DNA test to find out the paternity of the 3rd respondent. On the other hand, the petitioner filed Crl.M.P.No.204 of 2015 on the file of the II Additional Sessions Judge, Hindupur, asking respondent Nos.2 and 3 to undergo DNA test. In the counter filed in response to the said petition, the 2nd respondent has stated that she is not ready to undergo DNA test to find out the paternity of the 3rd respondent. On dismissal of the said petition, the petitioner filed Crl.P.No.2571 of 2016 before this Court and the same is pending consideration. In fact, this is a strong circumstance which goes against respondent Nos.2 and 3, more so, when the petitioner himself came forward with a petition for undergoing DNA test.

To further substantiate her case, the 2nd respondent examined PW.2, who is a resident of Hottebetta village. Though PW.2 deposed that the marriage of the petitioner and the 2nd respondent was performed at Hottebetta village in the house of Begadara Venkataramanappa, he himself further deposed that when he went to the village of respondent Nos.2 and 3, he observed that the parties are residing in one house at S.S. Gundlu village. But in the cross-examination, it has been elicited that he gave a false complaint in the Court resulting in imposition of fine of Rs.20,000/- against him. He stated that Venkataramanappa belongs to Ballija caste and he does not know the priest who performed the marriage of the petitioner and the 2nd respondent. He also stated that he

does not know the family affairs of the petitioner and the names of the members of his family.

PW.3, who was examined on behalf of the 2nd respondent, in her cross-examination categorically admitted that the petitioner had got two daughters, namely, Bharathi and Ammajakka with Nagamani. She also deposed that the petitioner was married to Nagamani about 20 or 25 years ago. On confronting Ex.R1 i.e., Rajeev Arogyasri Bheema Health Card of the said Nagamani, she identified the said Nagamani, but curiously she deposed that she does not know whether a son was born to the petitioner and the 2nd respondent. She also stated that the petitioner and the 2nd respondent were roaming as wife and husband. So this totally demolishes the case of the 2nd respondent. In the light of the above, though PWs.2 and 3 were examined, they have not supported the case of the 2nd respondent. On the other hand, they came up with a diametrically opposite version stating that the petitioner and the 2nd respondent are roaming as wife and husband giving a go-bye to the basic fact of they being husband and wife. Further, the 2nd respondent in her evidence stated that the 3rd respondent was born to her after two years of her marriage. According to her, her marriage with the petitioner was performed on 12.04.1996. If that be so, the 3rd respondent was born in the year 1998. If that is correct, by the date of filing of the maintenance case, the age of the 3rd respondent would be 14 years. But, curiously it has

been mentioned as 16 years. It is also a strong anomaly, which is starring at respondent No.2 and 3, and improbabilise their case.

It is also settled law that burden lies on the 2nd respondent to prove that she is the legally wedded wife of the petitioner. When the petitioner categorically denied his marriage with the 2nd respondent, it is necessary for the 2nd respondent to prove her marriage or at least that she lived with the petitioner under one roof as wife and husband for a long time. However, from the evidence of PWs.1 to 3, the same is not established. Though for the purpose of granting maintenance under Section 125 Cr.P.C., no strict proof of marriage is required, but still the 2nd respondent should adduce trustworthy evidence to substantiate her contention that she is the legally wedded wife of the petitioner. Though PWs.2 and 3 were examined on her behalf, they have not supported her case. Coupled with the same, the cross-examination made in the evidence of the 2nd respondent i.e., PW.1 it has been elicited that there are other people with similar names in the village in Kapu caste. Therefore, the 2nd respondent ought to have proved that except the petitioner there is no other person with similar name in the village, but she failed to adduce any rebuttal evidence in that regard. Though the validity of the marriage for the purpose of summary proceedings under Section 125 Cr.P.C., is to be determined on the basis of a *prima facie* evidence brought on

record and though the standard of proof of marriage in such proceedings, is not as strict as required in a trial of offence under Section 494 IPC, the 2nd respondent miserably failed to establish *prima facie* that she is the legally wedded wife of the petitioner. On the contrary, the evidence produced in the form of PWs.2 and 3 is inconsistent and not corroborated with PW.1. In these circumstances, viewed from any angle, the 2nd respondent miserably failed to prove that she is the legally wedded wife of the petitioner with any semblance of evidence.

When the petitioner has categorically denied his marriage with the 2nd respondent and also disputing the paternity of the 3rd respondent, the only conclusive proof to determine the said aspect is by way of scientific advancement accepted in the form of DNA test. So to perform the DNA test, the petitioner himself filed Crl.M.P.No.204 of 2015 in Crl.R.P.No.28 of 2015 in which the 2nd respondent filed a counter stating that she is not ready to undergo DNA test to find out the paternity of the 3rd respondent. In this regard, as the 2nd respondent has declined to undergo the DNA test, this Court can draw a presumption of the nature contemplated under illustration (h) of Section 114 of the Indian Evidence Act. The illustration (h) reads as under:

“114. Court may presume existence of certain facts:- The Court may presume, the existence of any fact which it thinks likely to have happened, regard being had to be common cause of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

The Court may presume –

(h) that if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him.”

To substantiate the said aspect, learned counsel for the petitioner relied on the judgment of this Court in **Govindula Sathaiah (3 supra)**. In the said case, this Court considered the effect of disinclination by the wife to undergo the DNA test and observed as under:

“Reverting to the facts of the case, it is to be noted that the petitioner/husband made categorical assertions regarding the infidelity of his wife in the petition filed by him for divorce and also in the affidavit filed in support of the instant petition. He has gone to the extent of naming the person, who was the father of the male child-Shiva Kumar born to the respondent/wife. On the ground that the wife gave birth to a child, who was not fathered by the petitioner, the divorce was sought. The law is now well settled that depending upon the facts and circumstances of the case, it would be permissible for a Court to direct for holding of a DNA test to determine the veracity of the allegations which constitute one of the grounds on which the petitioner would either succeed or lose. In the decision in Dipanwita Roy’s case (*supra*), the Supreme Court having noted the provision of Section 112 of the Indian evidence Act held as follows:

"We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the legislature. The result of DNA test is said to be scientifically accurate. Although Section 112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, in our opinion, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. The interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. In our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the

world community to be correct, the latter must prevail over the former.”

Here in the present case, the husband has categorically pleaded that he has no access to the wife and that he had not fathered the child. Therefore, there is a likelihood that the husband’s plea that he had no access to the wife when the child was begotten stands proved by the DNA test report as, in the facts and circumstances of the case, it is possible to opine that the proof based on DNA test would be sufficient to dislodge the presumption under Section 112 of the Evidence Act. This Court is in agreement with the argument of the learned counsel for the petitioner that but for the DNA test it would be impossible for the petitioner/husband to establish and confirm the assertions made in the pleadings. Therefore, this court is satisfied that a direction can be issued as prayed for in the petition of the husband. Having regard to the above analysis and the precedential guidance in the decision in *Dipanwita Roy’s* case (*supra*), which is binding on the parties as the facts of the case before the Supreme Court bear close similarity to the facts of the case which this Court is dealing presently, this Court finds that the order impugned brooks interference.”

In ***Dipanwita Roy (2 supra)***, the Apex Court, while considering the effect of illustration (h) of Section 114, observed as under:

“We would, however, while upholding the order passed by the High Court, consider it just and appropriate to record a caveat, giving the Appellant-wife liberty to comply with or disregard the order passed by the High Court, requiring the holding of the DNA test. In case, she accepts the direction issued by the High Court, the DNA test will determine conclusively the veracity of accusation levelled by the Respondent-husband, against her. In case, she declines to comply with the direction issued by the High Court, the allegation would be determined by the concerned Court, by drawing a presumption of the nature contemplated in Section 114 of the Indian Evidence Act, especially, in terms of illustration (h) thereof. Section 114 as also illustration (h), referred to above, are being extracted hereunder:

“114. Court may presume existence of certain facts - The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustration (h) - That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him.”

This course has been adopted to preserve the right of individual privacy to the extent possible, of course, without sacrificing the cause of justice. By adopting the above course, the issue of infidelity alone would be determined, without expressly disturbing the presumption contemplated under Section 112 of the Indian Evidence Act. Even though, as already stated above, undoubtedly the issue of legitimacy would also be incidentally involved.”

In **Nandlal Wasudeo Badwaik (1 supra)** this Court observed as under:

“We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the Legislature. The result of DNA test is said to be scientifically accurate. Although Section 112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, in our opinion, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. Interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. In our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former.

The husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, we cannot compel the appellant to bear the fatherhood of a child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardized as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. "Truth must triumph" is the hallmark of justice.”

In these circumstances, basing on the contentions raised by both the parties and the discussion made supra, this Court is of the opinion that an adverse inference has to be drawn against the 2nd respondent for not subjecting herself to undergo DNA test pursuant to Crl.M.P.No.204 of 2015 filed by the petitioner in Crl.R.P.No.28 of 2015. On the other

hand, in the said petition, the 2nd respondent stated that she is not ready to undergo DNA test. Coupled with this, the oral as well as the documentary evidence adduced on behalf of the 2nd respondent will not prove that she is the legally wedded wife of the petitioner, though the standard of proof of marriage in summary proceedings under Section 125 Cr.P.C., is not as strict as required in a trial of offence under Section 494 IPC. In these circumstances, this Court is of the opinion that the 2nd respondent miserably failed to make out her case that she is the legally wedded wife of the petitioner, whereby she is entitled for maintenance along with the 3rd respondent.

Accordingly, the criminal revision case is allowed and the orders passed in Crl.R.P.No.28 of 2015 dated 18.01.2018 on the file of the Court of the II Additional District and Sessions Judge, Hindupur, are set aside.

Miscellaneous petitions, if any, shall also stand dismissed.

P. KESHAVA RAO, J

Date: 05.07.2018.
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L.R. Copies to be marked.